

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOSHUA ROGAL,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of  
Social Security,

Defendant.

Case No. C12-5158-RSL-BAT

**REPORT AND  
RECOMMENDATION**

Joshua G. Rogal seeks review of the denial of his Disability Insurance Benefits application. He contends that the ALJ erred by (1) failing to consider limitations caused by all of his impairments; (2) improperly evaluating the medical evidence, Mr. Rogal's testimony, and the lay evidence; (3) improperly assessing Mr. Rogal's residual functional capacity; and (4) finding Mr. Rogal not disabled based on the erroneous RFC assessment. Mr. Rogal further asserts that (5) the new evidence he submitted to the Appeals Council shows that the ALJ's decision was not supported by substantial evidence and/or was based on legal error. Dkt. 14 at 2. As discussed below, the Court recommends that the Commissioner's decision be **AFFIRMED** and the case be **DISMISSED** with prejudice.

**I. FACTUAL AND PROCEDURAL HISTORY**

Joshua Rogal is currently 29 years old, has completed the 12th grade, and has worked as

1 a cashier, administrative assistant, teacher aide, home attendant and film tape librarian.<sup>1</sup> On July  
 2 22, 2008, he applied for benefits, alleging disability as of May 15, 2008. Tr. 137-38. His  
 3 application was denied initially and on reconsideration. Tr. 87-89, 91-92. The ALJ conducted a  
 4 hearing on July 15, 2010, and on September 24, 2010, issued a decision finding Mr. Rogal not  
 5 disabled. Tr. 39-82. As the Appeals Council denied Mr. Rogal's request for review, the ALJ's  
 6 decision is the Commissioner's final decision. Tr. 1-7.

## 7 II. THE ALJ'S DECISION

8 Utilizing the five-step disability evaluation process,<sup>2</sup> the ALJ found:

9 **Step one:** Mr. Rogal had not engaged in substantial gainful activity since May 15, 2008.

10 **Step two:** Mr. Rogal had the following severe impairments: degenerative disc disease of  
 11 the lumbar spine with lumbar spondylosis, chronic fatigue, and cognitive disorder.

12 **Step three:** These impairments did not meet or equal the requirements of a listed  
 13 impairment.<sup>3</sup>

14 **Residual Functional Capacity:** Mr. Rogal had the residual functional capacity to  
 15 perform light work in that he was able to lift and carry 20 pounds occasionally and 10  
 16 pounds frequently, to sit for 6 hours in an 8-hour workday, and to stand and/or walk for 6  
 17 hours in an 8-hour workday, with no limitations with regard to pushing or pulling the  
 18 above amounts. Mr. Rogal was occasionally able to climb ramps and stairs, but never  
 19 ladders, ropes, or scaffolds, and occasionally to balance, stoop, kneel, crouch, and crawl.  
 He was able to perform simple and some complex work. He must avoid hazards.

20 **Step four:** Mr. Rogal could perform his past work as a cashier, teacher aide, and film  
 21 tape librarian and was thus not disabled. In the alternative, considering Mr. Rogal's age,  
 22 education, work experience, and residual functional capacity, there are other jobs that  
 23 exist in significant numbers in the economy that Mr. Rogal also can perform. He is thus  
 also not disabled under the step-five framework.

Tr. 14-31.

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<sup>1</sup> Tr. 77, 137, 168, 186.

<sup>2</sup> 20 C.F.R. § 404.1520.

<sup>3</sup> 20 C.F.R. Part 404, Subpart P. Appendix 1.

### III. DISCUSSION

#### A. Step two

Mr. Rogal asserts that the ALJ's step two analysis was legally erroneous. At step two, the claimant must show that (1) he has a medically determinable impairment or combination of impairments, and (2) the impairment or combination of impairments is severe. *See Bowen v. Yuckert*, 482 U.S. 137, 146 (1987); 20 C.F.R. § 404.1620(c). An impairment is medically determinable if it results from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 404.1528. An impairment is severe if it significantly limits the claimant's physical or mental ability to do basic work activities. 20 C.F.R. § 404.1520(c), 404.1521(a). An impairment or combination of impairments is "not severe" if the evidence establishes a slight abnormality that has no more than a minimal effect on an individual's ability to work. *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996).

After determining that Mr. Rogal's degenerative disc disease, chronic fatigue, and cognitive disorder were severe impairments, the ALJ noted that Mr. Rogal also based his claim of disability in part on poor dexterity in his hands, migraine headaches, depression, and Addison's disease. The ALJ concluded, however, that none of these impairments, alone or in combination with Mr. Rogal's other impairments, was severe under the Social Security regulations. Specifically, the ALJ found that a comprehensive workup in 2007 regarding Mr. Rogal's hand complaints was "all negative," with no etiology for his complaints established. The ALJ concluded that Mr. Rogal had no medically determinable left upper extremity impairment. The ALJ also found that the evidence failed to establish a definitive diagnosis of Addison's disease, as treating doctor William Minter, D.O., reported in June 2009 that he did

1 not find any documentation to support the diagnosis in Mr. Rogal's medical records. The ALJ  
2 found that even if Addison's disease was medically determinable, there was insufficient evidence  
3 of any functional limitations resulting from that condition. The ALJ concluded that Addison's  
4 disease was not a severe impairment.<sup>4</sup> Tr. 20.

5 Mr. Rogal asserts that the ALJ's finding that his poor hand dexterity, migraine headaches,  
6 depression and Addison's disease were non-severe in combination with his other impairments  
7 was factually and legally incorrect because "the ALJ already found that Rogal had severe  
8 impairments," and, based on this finding, "the ALJ was required to consider at steps three, four,  
9 and five all of the functional effects caused by all of Rogal's impairments." Dkt. 14 at 4.  
10 Essentially, Mr. Rogal argues that the ALJ was required to consider the effects of all of these  
11 impairments at the later steps but did not.

12 Mr. Rogal is correct in asserting that an ALJ must consider the limitations imposed by all  
13 of a claimant's impairments, even those that are not severe. *See* 20 C.F.R. § 404.1545(a)(1). But  
14 the ALJ "must consider only limitations and restrictions attributable to medically determinable  
15 impairments." Social Security Ruling ("SSR") 96-8p. Mr. Rogal does not present any argument  
16 or authority to challenge the ALJ's finding that left upper extremity impairment and Addison's  
17 disease were not medically determinable. Similarly, Mr. Rogal does not present any argument or  
18 authority to challenge the ALJ's finding that migraines and depression were not severe. And,

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19 <sup>4</sup> The ALJ also noted that Mr. Rogal complained of urological problems during the alleged  
20 disability period and the record shows that Mr. Rogal suffered a urethral stricture as a result of  
21 his 2002 motor vehicle accident. The ALJ concluded that the objective medical evidence did not  
22 establish the existence of urethral stricture or any other urological impairment during the alleged  
23 disability period and found that Mr. Rogal did not have a severe urological impairment. Tr. 20.  
Finally, the ALJ noted that Mr. Rogal sustained a left-field visual impairment in the 2002  
accident, but the defect was not quantified and Mr. Rogal worked after the injury. The ALJ  
therefore concluded that the left-field visual impairment was medically determinable but not  
severe. Tr. 21. Mr. Rogal presents no arguments related to the ALJ's assessment of these  
impairments at step two. Accordingly, the Court does not address these findings.

1 more importantly, he failed to identify what limitations resulting from these impairments the ALJ  
2 failed to consider throughout the remaining steps of the disability evaluation process and how  
3 consideration of any such limitations would have altered the ALJ's decision.

4 It is not enough merely to present an argument in the skimpiest way, and leave the Court  
5 to do counsel's work—framing the argument and putting flesh on its bones through a discussion  
6 of the applicable law and facts. *See, e.g., Vandenboom v. Barnhart*, 421 F.3d 745, 750 (8th Cir.  
7 2005) (rejecting out of hand conclusory assertion that ALJ failed to consider whether claimant  
8 met Listings because claimant provided no analysis of relevant law or facts regarding Listings);  
9 *Perez v. Barnhart*, 415 F.3d 457, 462 n.4 (5th Cir. 2005) (argument waived by inadequate  
10 briefing); *Murrell v. Shalala*, 43 F.3d 1388, 1389 n.2 (10th Cir. 1994) (perfunctory complaint  
11 fails to frame and develop issue sufficiently to invoke appellate review). Mr. Rogal's conclusory  
12 assertion that the ALJ erred by failing to consider limitations caused by these impairments is  
13 insufficient to show error. Mr. Rogal has not met his burden of proving error at step two.

#### 14 **B. Medical evidence**

15 Mr. Rogal argues that the ALJ erroneously assessed the medical evidence from  
16 examining psychologist David Dixon, Ph.D., and treating doctors Dennis Phillips, M.D., William  
17 Minter, D.O., and Pedro Postigo, M.D. Dkt. 14 at 4-12. In general, the ALJ should give more  
18 weight to the opinion of a treating doctor than to that of a non-treating doctor, and more weight  
19 to the opinion of an examining doctor than to that of a non-examining doctor. *Lester v. Chater*,  
20 81 F.3d 821, 830 (9th Cir. 1996). Where it is not contradicted by another doctor, the ALJ may  
21 reject a treating or examining doctor's opinion only for "clear and convincing reasons." *Id.* at  
22 830-31. Where contradicted, the ALJ may not reject a treating or examining doctor's opinion  
23 without "specific and legitimate reasons" that are supported by substantial evidence in the

1 record. *Id.* at 830-31). An ALJ does this by setting out a detailed and thorough summary of the  
2 facts and conflicting evidence, stating her interpretation of the facts and evidence, and making  
3 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ must do more than  
4 offer her conclusions; she must also explain why her interpretation, rather than the treating  
5 doctor's interpretation, is correct. *Orn v. Astrue*, 495 F.3d 625, 632 (9th Cir. 2007) (citing  
6 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

7       1.       *Dr. Dixon*

8       Dr. Dixon evaluated Mr. Rogal in November 2008. He performed a mental status exam,  
9 finding Mr. Rogal had good functional social skills and was friendly and cooperative throughout  
10 the examination; he had some latency in his responses to questions; his predominant mood was  
11 depression, sadness, and frustration; his intellectual functioning was in the average range; and  
12 there was no evidence of thought or perceptual disorder. Dr. Dixon also performed memory  
13 testing and found scores ranging from the 0.1 to the 10th percentile, placing Mr. Rogal in the  
14 extremely low to low average range. Dr. Dixon diagnosed cognitive disorder, NOS (memory 0.1  
15 to 0.3%), dysthymic disorder, or rule out adult ADD/dyslexia, and assigned Mr. Rogal a global  
16 assessment of functioning ("GAF") score of 50, indicating serious symptoms or a serious  
17 impairment in social, occupational, or school functioning. *Am. Psychiatric Ass'n, Diagnostic*  
18 *and Statistical Manual of Mental Disorders ("DSM-IV")*, 34 (4th ed. text rev. 1994). Dr. Dixon  
19 opined Mr. Rogal was able to satisfactorily explain and justify his position; his ability to reason  
20 and understand was good; his concentration was fair to poor but he persists; he interacts well  
21 socially; and it appears he would adapt fairly well to new environmental conditions. Tr. 470-76.

22       The ALJ included a detailed summary of Dr. Dixon's evaluation, but did not state what  
23 weight she gave to his opinions. Tr. 25. Mr. Rogal characterizes this omission as a rejection of

1 Dr. Dixon's opinion and states that this Court "must therefore credit as true" his opinions about  
2 Mr. Rogal's GAF score, ability to concentrate and maintain attention, and low memory scores.  
3 Dkt. 14 at 5. The Commissioner asserts in response that although the ALJ did not expressly state  
4 the weight she gave to Dr. Dixon's opinion, her detailed accounting of the opinion and the fact  
5 that she assigned significant weight to a reviewing doctor who assessed the opinion shows that  
6 the ALJ considered the opinion and incorporated it into her residual functional capacity  
7 assessment. Dkt. 15 at 6.

8 An ALJ must evaluate each medical opinion, decide what weight to give it, and give  
9 specific reasons for the weight given. 20 C.F.R. § 404.1527(d); SSR 96-2p. Here, the ALJ did  
10 not state what weight she gave to Dr. Dixon's opinion or give specific reasons for the weight she  
11 gave it. This was error. However, an error may be harmless where the mistake was  
12 nonprejudicial to the claimant or irrelevant to the ALJ's ultimate decision. *See Stout v. Comm'r,*  
13 *Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006). The Court concludes that the ALJ's error  
14 here was harmless.

15 As the Commissioner points out, the ALJ thoroughly discussed Dr. Dixon's opinion,  
16 showing that the ALJ considered the opinion even though she did not state what weight she gave  
17 it. This is thus not a case where the ALJ simply ignored or neglected to mention a medical  
18 opinion. Moreover, the ALJ gave significant weight to the opinion of the state agency medical  
19 consultant, Vincent Gollogly, Ph.D, who relied on Dr. Dixon's assessment in forming his  
20 opinion. Tr. 27, 490-92. Dr. Gollogly opined that Mr. Rogal was able to understand, remember  
21 and perform simple, repetitive tasks in a stable, routine environment; he could work  
22 cooperatively with a supervisor, coworkers, and the public; he interacts well socially; and he  
23 could travel, take precautions, and make a plan. Tr. 492. He concluded that Mr. Rogal's

1 allegations of disability due to mental impairment were partially credible but he retained the  
2 capacity to perform full-time productive work without interruption from psychiatric symptoms.  
3 *Id.* This assessment is consistent with—and clearly based on—Dr. Dixon’s opinion that Mr.  
4 Rogal was able to reason and understand, had fair to poor concentration but was able to persist,  
5 interacted well socially, and would adapt well to new environmental conditions.

6 The ALJ incorporated Dr. Gollogly’s opinion into her residual functional capacity  
7 assessment, finding that Mr. Rogal was limited to simple work, with the exception that Mr.  
8 Rogal could perform some complex work, based on his own reports that he spends at least 1 hour  
9 per day on the computer doing research, e-mail, games, bill-paying, and Facebook. Tr. 26.  
10 Although Mr. Rogal may disagree, this finding is a rational interpretation of Dr. Gollogly’s  
11 opinion. Where there is more than one rational interpretation of the evidence, it is the ALJ’s that  
12 this Court must uphold. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). And although  
13 Mr. Rogal asserts that the Court should “credit as true” Dr. Dixon’s opinion, he does not explain  
14 what additional functional limitations that opinion should have imposed. Dkt. 14 at 5.

15 For all of these reasons, the Court concludes that the ALJ’s error in failing to assign  
16 weight to Dr. Dixon’s opinion was harmless error and does not warrant reversal of this case.

17 2. *Dr. Phillips*

18 Dr. Phillips wrote a letter in August 2008 opining that the injuries Mr. Rogal sustained  
19 from his 2002 motor vehicle accident will plague him for the rest of his life and make working  
20 extremely difficult if not impossible. Dr. Phillips stated Mr. Rogal was diagnosed with lumbar  
21 facet disease, which limits his range of motion and prevents him from lifting no more than 10  
22 pounds. Dr. Phillips also stated Mr. Rogal has severe back spasms that require him to be  
23 transported to the emergency room via ambulance for treatment, and that if he does not receive



1 treatment within 20 minutes, he has difficulty breathing in addition to severe pain. Dr. Phillips  
2 reported a diagnosis of chronic fatigue syndrome, which caused Mr. Rogal to be unable to be on  
3 his feet for more than 10 minutes and which left him unable to walk or to think clearly when he  
4 had a chronic fatigue syndrome episode. Dr. Phillips noted that a diagnosis of Addison's disease  
5 was questionable, but Mr. Rogal had responded well to treatment for the disease. And Dr.  
6 Phillips noted that Mr. Rogal had urinary control issues resulting from his injuries and cannot be  
7 more than a few minutes away from a restroom. Dr. Phillips asserted that these and other  
8 injuries, each directly resulting from the 2002 accident, are the reason why Mr. Rogal has been  
9 unable to work since 2006. Tr. 651.

10 The ALJ gave this opinion very little weight. First, the ALJ found that Dr. Phillips failed  
11 to explain why Mr. Rogal was able to work after the accident if his injuries had directly resulted  
12 from the accident; Mr. Rogal worked at substantial gainful activity levels in 2007 and 2008,  
13 making Dr. Phillips's statement that he was unable to work after 2006 inaccurate; and Dr.  
14 Phillips did not state that Mr. Rogal's injuries had progressed and rendered him unable to work  
15 by the alleged disability onset date. Tr. 27. An ALJ may give less weight to an opinion that is  
16 inconsistent with other evidence in the record. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d  
17 1190, 1195 (9th Cir. 2004). Dr. Phillip's opinion that Mr. Rogal was unable to work after 2006  
18 was inconsistent with the fact that Mr. Rogal's injuries occurred four years before that date yet  
19 he continued to work, he worked for two years after that date, and there was no evidence that his  
20 injuries had progressed. This was a specific and legitimate reason to reject the opinion.

21 And second, the ALJ found that, during the relevant period, there was no evidence of Mr.  
22 Rogal being rushed to the emergency room with muscle spasms and very little mention of  
23 ongoing urological problems; Dr. Phillips's statement that Addison's disease responded well to

1 treatment shows that it was not severe; and Mr. Rogal admitted he could stand for more than 10  
2 minutes. Tr. 27. The ALJ concluded that these examples show that Dr. Phillips's view of Mr.  
3 Rogal's functioning did not match his actual functioning during the relevant period. Tr. 27-28.  
4 Again, these inconsistencies with the other evidence in the record undermine Dr. Phillips's  
5 opinion. This was also a specific and legitimate reason for rejecting the opinion.

6 Mr. Rogal asserts that the ALJ ignored the fact that Mr. Rogal worked after 2006 despite  
7 Dr. Phillips's advice that he not work. Dkt. 14 at 8. But that fact merely underscores the conflict  
8 between Dr. Phillips's opinion and the evidence. Mr. Rogal argues that, while Dr. Phillips did  
9 not opine that Mr. Rogal's injuries had progressed since his accident, Mr. Rogal's testimony is  
10 consistent with such a finding. Dkt. 14 at 8. While that may be true, he merely offers an  
11 alternative interpretation of the evidence, one the ALJ was not required to accept. Mr. Rogal  
12 argues that the fact that Dr. Phillips discussed problems that existed before the alleged onset date  
13 is not a reason to reject the entire opinion. Dkt. 14 at 8. But the ALJ could validly consider the  
14 fact that Mr. Rogal's condition was no longer consistent with Dr. Phillips's opinion. And Mr.  
15 Rogal asserts that his testimony that he could stand for 15 to 20 minutes is not a legitimate  
16 reason to reject Dr. Phillips's opinion that he could stand for 10 minutes. Dkt. 14 at 9. While  
17 this difference is small, when combined with the other inconsistencies in Dr. Phillips's opinion,  
18 the Court cannot say the ALJ erred in considering it. None of Mr. Rogal's assertions cures the  
19 inconsistencies in Dr. Phillips's opinion. At best, Mr. Rogal merely proposes a more favorable  
20 interpretation of the opinion. But where the ALJ's interpretation is rational, the Court must  
21 uphold it. *Thomas*, 278 F.3d at 954. The ALJ did not err in evaluating Dr. Phillips's opinion.

22 3. *Dr. Minter*

23 Dr. Minter began treating Mr. Rogal on September 8, 2008. He took an "extensive

1 medical history” and performed a “brief” examination. Dr. Minter noted that Mr. Rogal  
2 brought a file of medical records 10 inches thick, and “talks a lot about his injuries and current  
3 deficits and his inability to work.” Dr. Minter wanted another visit “to get a better handle on his  
4 situation.” Tr. 468-69. That same day, Dr. Minter wrote a letter in which he stated that he  
5 concurred with the January 30, 2008 evaluation by Dr. Phillips that there was no change in Mr.  
6 Rogal’s medical status in the past nine months. Dr. Minter stated that a thorough review of Mr.  
7 Rogal’s extensive medical history shows ongoing back pain, loss of left visual field, chronic  
8 fatigue, recurrent migraines, peripheral neuropathy, Addison’s disease, and bladder dysfunction  
9 with incontinence and urgency. Dr. Minter opined that Mr. Rogal was “medically disabled and  
10 more likely than not he will not return to the active workforce.” Tr. 478.

11 The ALJ gave this opinion little weight because while Dr. Minter stated he based his  
12 opinion on the medical record, it appears that he based the assessment more on Mr. Rogal’s  
13 subjective complaints than his actual functioning. The ALJ also noted that, as with Dr. Phillips,  
14 the medical record that Dr. Minter reportedly relied on largely addressed the period before Mr.  
15 Rogal’s alleged disability onset date. And the ALJ also found that Dr. Minter did not perform a  
16 function by function analysis and seemed to conclude that the combination of diagnoses led  
17 inevitably to a finding of disability, which is not the standard for Social Security disability  
18 determinations. Tr. 28.

19 Mr. Rogal argues that the “ALJ’s accusation that Dr. Minter is lying about the basis of  
20 his opinion” is not supported by the evidence. Dkt. 14 at 10. The ALJ did not state that Dr.  
21 Minter was lying. Rather, the ALJ relied on the fact that Dr. Minter spent much of his visit  
22 with Mr. Rogal discussing his subjective complaints and was able to perform only a brief  
23 examination, to find that the doctor based his opinion more on Mr. Rogal’s complaints than his

1 actual functioning. An ALJ may give less weight to a medical opinion that is based to a large  
2 extent on a claimant's self-reports that the ALJ has properly found not credible. *Tommasetti v.*  
3 *Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). Given the ALJ's credibility finding, discussed  
4 below, this was a valid reason for rejecting Dr. Minter's opinion.

5 Even if this was an improper reason to reject Dr. Minter's opinion, the ALJ gave two  
6 other, valid reasons. The ALJ fact that the medical records Dr. Minter reviewed largely  
7 addressed the period before the alleged onset date was a valid reason for giving the opinion little  
8 weight, particularly when combined with the fact that Dr. Minter performed only a single, brief  
9 examination before writing the letter and thus did not have an extensive treating relationship on  
10 which to base his opinions. And the fact that Dr. Minter's opinion was conclusory and opined  
11 that Mr. Rogal was disabled based solely on his diagnoses was also a valid reason to give it little  
12 weight. *See Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995) (ALJ may reject conclusory  
13 opinion); 20 C.F.R. § 1527(e)(1), (3) (statement by a medical source that a claimant is "disabled"  
14 or "unable to work" is an opinion on an issue reserved to the Commissioner and not given any  
15 special significance). The ALJ did not err in evaluating Dr. Minter's opinion.

#### 16 4. Dr. Postigo

17 Dr. Postigo was Mr. Rogal's treating neurologist from 2005 to 2007. Throughout the  
18 course of treatment, Dr. Postigo noted fatigue, migraines, memory problems, back pain, and  
19 urinary tract problems. 592-608. In March 2007, Dr. Postigo performed neurodiagnostic testing  
20 on Mr. Rogal's left arm, which found normal motor and sensory conduction velocities and  
21 normal EMG examination; Dr. Postigo's exam found no obvious atrophy or significant weakness  
22 in the left arm. Tr. 593-94. The ALJ did not discuss the medical evidence from Dr. Postigo.

23 Mr. Rogal asserts that even though this evidence pre-dates the alleged onset date, it is

1 significant because it is consistent with the opinions of Dr. Phillips and Dr. Minter, and it shows  
2 the ALJ erred in finding Mr. Rogal's left arm impairment was not severe. Dkt. 14 at 12.

3 An ALJ must explain why "significant, probative evidence has been rejected," and must  
4 explain why uncontroverted medical evidence is rejected. *Vincent v. Heckler*, 739 F.2d 1393,  
5 1395 (9th Cir. 1984). However, while the ALJ must "make fairly detailed findings in support of  
6 administrative decisions to permit courts to review those decisions intelligently," the ALJ "need  
7 not discuss all evidence presented." *Id.* at 1394-95. Dr. Postigo's medical records predate the  
8 alleged onset date and offer no information not available elsewhere in the record. And the fact  
9 that Dr. Postigo found normal results on testing Mr. Rogal's left arm is consistent with the  
10 February 2007 testing the ALJ referenced in finding no medically determinable left arm  
11 impairment. The ALJ did not err by failing to discuss Dr. Postigo's records.

### 12 **C. Mr. Rogal's credibility**

13 Mr. Rogal argues that the ALJ improperly found him not fully credible. The ALJ did not  
14 find that Mr. Rogal was malingering. Thus, the ALJ was required to provide clear and  
15 convincing reasons to reject his testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir.  
16 2001). An ALJ does this by making specific findings supported by substantial evidence.  
17 "General findings are insufficient; rather, the ALJ must identify what testimony is not credible  
18 and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

19 The ALJ gave several reasons for finding Mr. Rogal not fully credible. First, the ALJ  
20 found that the treatment record did not corroborate the degree of restriction Mr. Rogal alleged.  
21 Tr. 23. Mr. Rogal repeats his arguments regarding the medical evidence discussed above,  
22 asserting that the errors he identified above tainted the ALJ's credibility analysis. Dkt. 14 at 13.  
23 But the Court found no error in the ALJ's analysis of the medical evidence. Mr. Rogal also

1 argues that it is error for the ALJ to reject a claimant's credibility based solely on a lack of  
2 supporting medical evidence. *Id.* at 14. Although lack of objective medical evidence cannot be  
3 the sole reason an ALJ discounts subjective complaints, it is a relevant factor that the ALJ can  
4 consider in his credibility analysis. *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005). The  
5 lack of support from the medical record was a valid reason to discount Mr. Rogal's credibility.

6 Second, the ALJ noted that Mr. Rogal returned to work after his 2002 motor vehicle  
7 accident at least by 2003, and worked until the alleged disability onset date in mid 2008. Tr. 23.  
8 Mr. Rogal argues that the fact that he worked before his alleged disability period is not a reason  
9 to question his credibility. Dkt. 14 at 14. But a claimant's ability to work with limitations that  
10 existed before his alleged onset date is a relevant consideration. *See Bayliss v. Barnhart*, 427  
11 F.3d 1211, 1216 (9th Cir. 2005) (ALJ may reject doctor's opinion that claimant cannot work  
12 based on limitations that existed during period when claimant worked).

13 And third, the ALJ found that Mr. Rogal's activities reflect a level of functioning that is  
14 inconsistent with his claims of disability and show that he is fully capable of performing as set  
15 forth in the residual functional capacity finding. Tr. 26. The ALJ noted that Mr. Rogal reported  
16 no trouble managing his finances, he drove or rode to get places, he shopped in stores or on the  
17 computer a few times a week, he paid bills online and used the computer for email, research, and  
18 Facebook, he read inspirational books, he visited with a friend every day and went with friends  
19 to a restaurant once a month, he talked on the phone regularly with friends and family, he  
20 regularly went to the coffee shop down the street, and although he said he had trouble getting  
21 along with others because they did not understand his pain, he got along fine with authority  
22 figures. Tr. 26.

23 An ALJ may consider a claimant's daily activities when evaluating his credibility. *Light*,

1 119 F.3d 789, 792 (9th Cir. 1997). The ALJ may not penalize a claimant for attempting to live a  
2 normal life in the face of his limitations. *See Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir.  
3 1987). But contradictions between a claimant's reported activities and his asserted limitations  
4 are an issue of credibility. *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir.  
5 1999). In addition, daily activities that are transferrable to a work setting may be grounds for an  
6 adverse credibility finding. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

7 Mr. Rogal argues that his daily activities are consistent with his testimony, they are not  
8 transferrable to a work setting, and the ALJ did not make specific findings explaining how Mr.  
9 Rogal's daily activities would be transferrable to work skills. Dkt. 14 at 16. Mr. Rogal's  
10 assertion that his daily activities do not contradict his testimony is nothing more than an  
11 alternative interpretation of the evidence. Because the ALJ's interpretation is rational, the Court  
12 must uphold it. And although Mr. Rogal asserts that his daily activities are not transferrable to a  
13 work setting, the ALJ did not rely on such a finding in evaluating Mr. Rogal's credibility. The  
14 contradiction between Mr. Rogal's claimed limitations and his daily activities was a valid reason  
15 to discount his credibility.

16 Because the ALJ gave specific, clear and convincing reasons for finding Mr. Rogal not  
17 fully credible, the Court finds no error in the ALJ's credibility assessment.

#### 18 **D. Lay witness evidence**

19 Mr. Rogal argues that the ALJ erred in evaluating the lay witness evidence from his  
20 mother, Sharry Graham, and his friend, Frederick Brown. The ALJ must consider lay witness  
21 testimony unless the ALJ expressly determines to disregard such testimony and gives specific  
22 reasons germane to each witness for doing so. *See Stout*, 454 F.3d at 1053; *Lewis v. Apfel*, 236  
23 F.3d 503, 511 (9th Cir. 2001).

1 In June 2010, Ms. Graham completed a questionnaire in which she stated that Mr. Rogal  
2 experienced back spasms that can be seen through his clothing, he drops items, limps  
3 sporadically, and he can be overtaken by waves of fatigue and also bouts of wakefulness. She  
4 has seen his fingers be very stiff, he cannot sit or stand for any length of time, and he spends  
5 most of his time in a recliner. He has a great deal of trouble getting along with family,  
6 coworkers, and friends because he has isolated himself. His memory is "not terrific," he does  
7 not finish tasks, loses focus, and stops one thing and starts on another. He was never flexible  
8 with changes. He was unable to work after his move to Washington because of his pain. He  
9 needs access to a bathroom at a moment's notice and requires extended time in the bathroom due  
10 to his urethral injuries. Tr. 229-34.

11 In June 2010, Mr. Brown completed a questionnaire in which he stated that he had known  
12 Mr. Rogal for two years and saw him every day. Mr. Rogal was unable to sit in one spot for  
13 more than 30 minutes and unable to stand for more than 15 to 25 minutes. Mr. Rogal needs help  
14 with virtually all household tasks. Mr. Rogal often forgets plans he has made with Mr. Brown.  
15 Mr. Rogal also tends to stay at home and not go places or do things. Tr. 220-28. In July 2010,  
16 Mr. Brown wrote a letter describing an incident that occurred in May 2010, in which Mr. Rogal  
17 sent a text message requesting Mr. Brown to come to his house. When Mr. Brown arrived, he  
18 was unable to rouse Mr. Rogal. When Mr. Rogal finally awoke, he explained that he was aware  
19 of everything Mr. Brown did, but was unable to get his body to respond. Mr. Rogal declined Mr.  
20 Brown's suggestion to go to the emergency room. Tr. 237.

21 The ALJ found that these statements were not supported by the medical evidence. The  
22 ALJ noted as an example that the May 2010 incident was not documented in the medical record  
23 and concluded that if it had been as severe as described, Mr. Rogal would have sought treatment



1 for the problem. The ALJ also noted that Mr. Rogal did not mention urinary problems at the  
2 hearing, except in the context of medication side effects, which did not include urinary urgency  
3 or the need to have quick access to a restroom. The ALJ thus found that the witnesses based  
4 their statements on Mr. Rogal's representations of his functioning, which are not consistent with  
5 the medical evidence. The ALJ gave the statements little weight. Tr. 29.

6 An ALJ may not reject lay witness evidence as unsupported by the medical evidence.  
7 *See Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009). But an ALJ may discount lay  
8 testimony that conflicts with medical evidence. *Lewis*, 236 F.3d at 511. Thus, to the extent the  
9 ALJ was noting conflicts with the medical evidence, as with Ms. Graham's statements about Mr.  
10 Rogal's urinary problems, this was a valid reason for giving the statements little weight.

11 Moreover, where an ALJ has provided clear and convincing reasons for finding a  
12 claimant not fully credible, and where the lay witness evidence is similar to the claimant's  
13 complaints, the ALJ has provided germane reasons for rejecting the lay witness testimony. *See*  
14 *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009). Ms. Graham's and  
15 Mr. Brown's statements described limitations similar to Mr. Rogal's own statements of his  
16 symptoms. Thus, the fact that they were based on Mr. Rogal's unreliable self-reports was a valid  
17 reason to give them little weight.

18 To the extent the ALJ erred by rejecting the lay witness statements because they were  
19 unsupported by the medical evidence, this error was harmless. The ALJ gave other, valid  
20 reasons for rejecting the statements. The error was thus nonprejudicial or irrelevant to the ALJ's  
21 ultimate decision. *See Stout*, 454 F.3d at 1055. The ALJ's assessment of the lay witness  
22 evidence should be upheld.

**E. The ALJ's residual functional capacity assessment and finding of non-disability**

Mr. Rogal argues that the ALJ erred in assessing his residual functional capacity, finding him not disabled at step four, and finding him not disabled in the alternative at step five because she failed to include all the limitations opined by Dr. Dixon, Dr. Phillips, Dr. Minter, and Dr. Postigo, as well as the limitations he described in his own testimony. Dkt. 14 at 21-23. Because the Court found no reason to disturb the ALJ's assessment of this evidence, Mr. Rogal's arguments here fail.

Mr. Rogal also argues that the ALJ erred by failing to include all the limitations opined by state agency reviewing doctor Vincent Gollogly, Ph.D. Dkt. 14 at 21. Dr. Gollogly completed a mental residual functional capacity assessment form in December 2008. He checked boxes indicating that Mr. Rogal would be moderately limited in his ability to understand, remember, and carry out detailed instructions; maintain attention and concentration for extended periods; perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances, complete a normal workday and workweek without interruption from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods; accept instructions and respond appropriately to criticism from supervisors; get along with coworkers or peers without distracting them or exhibiting behavioral extremes; and respond appropriately to changes in the work setting. Tr. 490-91. In the narrative portion of the form, Dr. Gollogly opined that Mr. Rogal was able to understand, remember, and perform simple, repetitive tasks in a stable and routine environment, work cooperatively with a supervisor, coworkers, and the public, interact well socially, travel, take precautions, and make plans. Tr. 492. He believed Mr. Rogal's allegations of disability due to mental impairment were partially credible, but he retains the capacity to perform full time

1 productive work without interruption from psychiatric symptoms within the limitations he  
2 opined. *Id.* The ALJ found that her assessment was consistent with Dr. Gollogly's opinion and  
3 gave the opinion significant weight. Tr. 27.

4 Mr. Rogal argues that the ALJ failed to include in her residual functional capacity  
5 assessment the check-box limitations and limitation to simple, repetitive tasks opined by Dr.  
6 Gollogly. Dkt. 14 at 22. While the ALJ did not list each and every finding from the check-box  
7 portion of the form, the ALJ's residual functional capacity finding is consistent with the  
8 limitations Dr. Gollogly opined in the narrative section, with one exception. This exception was  
9 the ALJ's finding that Mr. Rogal could perform some complex work, which the ALJ based on  
10 Mr. Rogal's testimony that he spends at least one hour each day on the computer doing research,  
11 e-mail, games, bill-paying, and Facebook. Tr. 26. To the extent Dr. Gollogly's check-box  
12 opinions contradicted his narrative assessment, this was a conflict in the evidence that the ALJ  
13 was entitled to resolve. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Similarly, the  
14 ALJ was entitled to resolve the contradiction between Dr. Gollogly's opinion about Mr. Rogal's  
15 ability to perform complex tasks and Mr. Rogal's own reports about his activities. The Court  
16 declines to disturb the ALJ's assessment of Dr. Gollogly's opinion.

17 The Court concludes that the ALJ did not err in assessing Mr. Rogal's residual functional  
18 capacity, in finding him able to perform his past work, or in finding in the alternative that he  
19 could perform other jobs.

#### 20 **F. Appeals Council evidence**

21 Finally, Mr. Rogal argues that the Commissioner erred by failing to remand the case for a  
22 new hearing based on the new evidence he submitted to the Appeals Council. Dkt. 14 at 23.  
23 This new evidence consists of a letter Dr. Phillips wrote on January 30, 2008, in which he

1 summarized his knowledge of Mr. Rogal's treatment history since his June 2002 accident. Tr.  
2 696. The Appeals Council considered the letter, but found that it was similar to Dr. Phillips's  
3 July 2008 opinion, which was adequately addressed in the ALJ's decision. The Appeals Council  
4 found that the decision was supported by substantial evidence. Tr. 2.

5 When the Appeals Council considers additional material as part of its review of the ALJ's  
6 decision and concludes that the new material does not provide a basis for changing the hearing  
7 decision, the new material and the Appeals Council's ruling are subject to this Court's review.  
8 *Ramirez v. Shalala*, 8 f.3d 1449, 1451-52 (9th Cir. 1993).

9 The Appeals Council's ruling that the new evidence is similar to Dr. Phillips's other  
10 opinions is supported by substantial evidence. Dr. Phillips's January 2008 letter, which predates  
11 Mr. Rogal's alleged onset date by several months, contains largely the same opinions as his  
12 August 2008 letter. As the Court found no error in the ALJ's assessment of that letter, the Court  
13 sees no reason to disturb the ALJ's decision based on an earlier letter containing largely the same  
14 information. The Appeals Council did not err by rejecting the opinions contained in Dr.  
15 Phillips's January 2008 letter or by finding that the letter did call into question the validity of the  
16 ALJ's decision.

#### 17 IV. CONCLUSION

18 For the foregoing reasons, the Court recommends that the Commissioner's decision be  
19 **AFFIRMED** and the case be **DISMISSED** with prejudice.

20 A proposed order accompanies this Report and Recommendation. Objections, if any, to  
21 this Report and Recommendation must be filed and served no later than **December 21, 2012**. If  
22 no objections are filed, the matter will be ready for the Court's consideration on **December 28,**  
23 **2012**. If objections are filed, any response is due within 14 days after being served with the

1 objections. A party filing an objection must note the matter for the Court's consideration 14  
2 days from the date the objection is filed and served. Objections and responses shall not exceed  
3 twelve pages. The failure to timely object may affect the right to appeal.

4 DATED this 7th day of December, 2012.

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7 BRIAN A. TSUCHIDA  
8 United States Magistrate Judge  
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